LIBRARY
Supreme Court, U. S.
FILED
APR 21 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1196

WATERFRONT GUARD ASSOCIATION, Local 1272, Independent Watchmen's Association of The Port of Baltimore, Maryland,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

AMSTAR CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MATTHEW E. MURRAY
JOHN D. O'BRIEN
DOUGLAS K. MAGARY
Attorneys for Respondent

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
1819 H Street, N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - FR 7-6008 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
STATUTES INVOLVED	1
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
The *Steelworker's Trilogy* And *Gateway Coal* Cited By Petitioner Have No Bearing On The Relationship Of The National Labor Relations Board To Arbitration	4
The Board Has Plenary Authority To Decide Unfair Labor Practice Cases And Complete Discretion Regarding Deferral To Arbitration	5
Contrary To Petitioner's Claim, The *Spielberg* Standards Were Properly Applied And The Fourth Circuit Was Justified In Enforcing The Board's Order	7
CONCLUSION	9
APPENDIX A	1a
APPENDIX B	2a

TABLE OF AUTHORITIES CITED

Cases: Page

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 7

Carey v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964) 6

Gateway Coal Company v. *United Mineworkers of America*, 414 U.S. 368 (1974) 5

Glendale Mfg. Co. v. *Local 520, ILGWU*, 283 F.2d 936 (CA 4 1960) *cert. denied* 366 U.S. 950 (1961) 4

International Harvester Co., 138 NLRB 923 (1962) 6

International Ladies Garment Workers Union v. *N.L.R.B.*, 366 U.S. 731 (1971) 8

N.L.R.B. v. *Acme Industrial Co.*, 385 U.S. 432 (1967) 5

N.L.R.B. v. *Plasterers' Local 79*, 404 U.S. 116 (1971) 6

Spielberg Manufacturing Co., 112 NLRB 1080 (1955) 4, 5, 6, 7

United Steelworkers of America v. *American Mfg. Co.*, 363 U.S. 564 (1960) 4, 5, 6, 7

United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) 4, 5, 6, 7

United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 4, 5, 6, 7

Statutes:

29 U.S.C. § 158(b)(1)(A) 8

29 U.S.C. § 158(b)(2) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1195

WATERFRONT GUARD ASSOCIATION, Local 1852, Independent Watchmen's Association of The Port of Baltimore, Maryland,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

AMSTAR CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent, Amstar Corporation (hereinafter referred to as "Amstar") opposes the Petition for a Writ of Certiorari filed by the Waterfront Guard Association and respectfully requests that it be denied.

STATUTES INVOLVED

In addition to the statutory provisions cited in the Petition, the following provisions of the Labor Manage-

ment Relations Act of 1947, set out verbatim in Appendix A, are relevant hereto: Section 8(b)(1)(A), (29 U.S.C. § 158(b)(1)(A)) and Section 8(b)(2), (29 U.S.C. § 158(b)(2)).

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case contains a number of factual inaccuracies which necessitate a response. Rather than include a separate statement of the case, we have addressed below those inaccuracies in order to correct Petitioner's Statement of the Case.

Petitioner states that the Collective Bargaining Agreement between it and the Steamship Trade Association was negotiated on Amstar's behalf. This point was never conceded by Amstar and, indeed, evidence was introduced into the record before the Administrative Law Judge in the unfair labor practice proceeding to support Amstar's contention that it never agreed to be bound by this Labor Agreement. The Administrative Law Judge found that:

> 3. Amstar, although a member of the Association, has at no time material herein delegated any authority to the Association to represent it in negotiations with the Respondent with respect to the wages, hours and conditions of employment of employees employed by Pinkerton to perform guard services at the Respondent's facility in Baltimore. (App. B at 15a-16a, Conclusion of Law 3).

Petitioner, in the first paragraph of its Statement of the Case, mistakenly asserts that the Arbitrator held Amstar did not have the right to contract for guard services with an independent contractor. This was not his holding. On the contrary, the Arbitrator merely held that the guards in question performed work within the jurisdictional language of the above mentioned Labor

Agreement, and therefore were required by its union security provision to become members of Petitioner. A clear understanding of the arbitration decision is important since the NLRB and its Administrative Law Judge held Petitioner's attempt to cause Amstar to comply with this Award of the Arbitrator constituted a violation of Section 8(b)(1)(A) and 8(b)(2) of the Act. (App. B at 16a, Conclusion of Law 5).

In the second paragraph of its Statement of the Case, Petitioner incorrectly characterizes the decision of the District Court in denying Amstar's Motion to Dismiss or for Summary Judgment, as "generally [upholding] the validity of the Arbitration Award." (Pet. at 3). The District Court was primarily concerned with the legal issues pertaining to Amstar's contention that compliance with the Arbitrator's Award would result in the commission of an unfair labor practice. After considering Amstar's arguments and various decisions of the National Labor Relations Board interpreting the National Labor Relations Act, the Court initially concluded that "[e]nforcement of the award would not necessarily result in an unfair labor practice" (363 F.Supp. at 1034). Although the Court denied Amstar's Motion to Dismiss or for Summary Judgment, it subsequently entered a stay, after the Administrative Law Judge's decision and while the unfair labor practice case was on appeal to the Labor Board and subsequently to the Fourth Circuit. A second stay order of the District Court is presently in effect (Respondent's Appendix B). Thus, contrary to Petitioner's assertion, the District Court did not uphold the Arbitration Award, but rather stayed the proceedings before it pending final judicial review of this decision.

REASONS FOR DENYING THE WRIT

Rule 19 of this Court's Rules sets forth general considerations or grounds governing decisions whether to

grant petitions for *certiorari.* It is not entirely clear which of those grounds Petitioner relies upon in seeking *certiorari.* However, the thrust of the Petitioner's argument is that the Fourth Circuit's affirmance of the NLRB's refusal to defer to the Award of the Arbitrator is in conflict with the decisions of this Court in the *Steelworker's Trilogy.*[1]

In addition Petitioner urges that the issuance of *per curiam* decision by the Fourth Circuit shows a lack of "serious consideration" of the issues by the Court. This contention is not worthy of a protracted response. Utilization of a *per curiam* decision by the Court reflects, in all probability, its recognition of the general judicial acceptance of the Labor Board's *Spielberg* doctrine,[2] as well as the fact it had previously decided that arbitration awards repugnant to the policies of the Act must be disregarded. *Glendale Mfg. Co.* v. *Local 520, ILGWU,* 283 F.2d 936 (CA 4 1960) *cert. denied,* 366 U.S. 950 (1961).

The *Steelworker's Trilogy* And *Gateway Coal* Cited By Petitioner Have No Bearing On The Relationship Of The National Labor Relations Board To Arbitration.

This Court in the *Steelworker's Trilogy* dealt with the relationship between the jurisdiction of arbitrators and federal courts. In them it held that national labor policy favors labor arbitration and the courts should

---

[1] *United Steelworkers of America* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

[2] In *Spielberg Manufacturing Co.,* 112 NLRB 1080 (1955), the Board enunciated certain tests that must be met before it will recognize the validity of an arbitration award. These are: (a) the proceedings must have been fair and regular; (b) all parties must have agreed to be bound; and (c) the decision of the arbitrator must not be clearly repugnant to the Act.

defer to an arbitration award, so long as ". . . it draws its essence from the collective bargaining agreement." *Enterprise Wheel, supra* at 597. Neither the *Steelworker's Trilogy*, nor *Gateway Coal* (*Gateway Coal Company* v. *United Mineworkers of America*, 414 U.S. 368 (1974)) relied on by Petitioner addressed the relationship between the NLRB's jurisdiction and that of arbitrators.

Moreover, this Court in *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967) noted that the *Steelworker's Trilogy* ". . . dealt with the relationship of courts to arbitrators . . ." and that "[t]he relationship of the Board to the arbitration process is of a quite different order." Id. at 436. The Court concluded that:

> . . . to view the Steelworkers decisions as automatically requiring the Board in this case to defer to the primary determination of an arbitrator is to overlook important distinctions between those cases and this one. (Id. at 437).

Thus, the Court has already rejected Petitioner's argument that the *Trilogy* requires the Board to defer to arbitration.

The Board Has Plenary Authority To Decide Unfair Labor Practice Cases And Complete Discretion Regarding Deferral To Arbitration.

Petitioner's argument implies that the National Labor Relations Board has no jurisdiction to reconsider in an unfair labor practice case, a matter which has been the subject of a prior arbitration decision. In other words, Petitioner appears to argue that the *Steelworker's Trilogy* is inconsistent with the NLRB's *Spielberg* doctrine. A review of the post *Trilogy* cases dealing with the Board's jurisdiction, *vis a vis* arbitration, reveals just the opposite, namely, that the Board has full authority to decide whether particular acts constitute an

unfair labor practice, even though such acts may also be claimed to constitute a violation of a collective bargaining agreement. In other words, the Board is not *required* in such circumstances to defer to arbitration, nor is it bound to accept in all instances an arbitrator's determination. In *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964), this Court expressly approved the Board's *Spielberg* doctrine and recognized that under that doctrine the Board's jurisdiction is superior to that of an arbitrator. There the Court said: "[s]hould the Board disagree with the arbiter . . . the Board's ruling would, of course, take precedence. . . ." 375 U.S. at 272. In *Carey*, the Court cited with approval the following language taken from the Board's decision in *International Harvester Co.*, 138 NLRB 923, 927 (1962) in which the *Spielberg* doctrine was extended to representation cases:

> There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. (375 U.S. at 271).[3]

In *N.L.R.B.* v. *Plasterers' Local 79*, 404 U.S. 116 (1971), another post *Trilogy* case, this Court again expressed the view that the Board is not required to honor arbitration awards in all circumstances:

---

[3] In *International Harvester*, the Board further enunciated the rationale of *Spielberg*:

> If complete effectuation of the Federal policy is to be achieved, . . . the Board . . . should give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself,' and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act. (138 NLRB at 927).

> Although the Board is not statutorily required to honor arbitration awards in such situations, it often defers to them if the arbitrator has considered the alleged unfair labor practice. [citing *Spielberg* and *International Harvester*] (Id. at 137).

Only last year in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) the Court, speaking through Justice Powell, discussed the relationship of the NLRB and arbitration as follows:

> [T]he Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge . . . under the Act. Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964). Cf. Smith v. Evening News Assn., 371 U.S. 195 (1962). There . . . the relationship between the forums [arbitration and the NLRB] is complementary since consideration of the claim by both forums may promote the policies underlying each. (415 U.S. at 50-51).

Thus, Justice Powell expressly recognized that the Federal labor policy favoring arbitration and the NLRB's *Spielberg* doctrine are complementary. Hence the Court has *expressly* rejected Petitioner's position that the two policies are inconsistent.

Contrary To Petitioner's Claim, The *Spielberg* Standards Were Properly Applied And The Fourth Circuit Was Justified In Enforcing The Board's Order.

Inconsistent with its argument that the *Steelworker's Trilogy* vitiates the *Spielberg* doctrine and deprives the Board of any discretion with respect to deferral to arbitration, Petitioner also contends that the *Spielberg* standards were misapplied. It is argued that the Administrative Law Judge, the Board and, consequently,

the Fourth Circuit erred, first, in finding that Amstar was not bound by the labor agreement with respect to representation of the Pinkerton guards and, second, that the Award was repugnant to the policies of the Act. With respect to the first point, the Administrative Law Judge based his conclusion that Amstar was not bound by the agreement with respect to representation of the Pinkerton guards on evidence showing that Amstar had never delegated any authority to the Steamship Trade Association to negotiate on its behalf (App. B at 7a). He further relied on undisputed evidence that Pinkerton has never been a member of the multi-employer association and has never delegated any authority to that Association to negotiate on its behalf (App. B at 6a-7a). Finally he relied on uncontradicted evidence which showed that Amstar had never posted the $500 bond required of employer members of the Association whose employees were covered by the labor agreement with Petitioner (App. B at 13a n.2).

With respect to the second point, namely Petitioner's contention that the Award is not repugnant to the policies of the Act, we would simply point out that this Court has long held that entering into a contract with a minority union is a violation of Section 8(b)(1)(A) on the part of the Union. *Int'l. Ladies Garment Workers Union* v. *N.L.R.B.*, 366 U.S. 731 (1961). A representative of Petitioner admitted at the hearing that the Union *never* claimed to represent any of the Pinkerton guards (App. B at 9a-10a). For all of these reasons, Petitioner's contention that the *Spielberg* criteria were misapplied in this case is without merit. On the contrary, the foregoing evidence described in the Administrative Law Judge's decision constitutes substantial evidence on the record as a whole supporting the Board's decision and justifying enforcement by the Fourth Circuit.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

AMSTAR CORPORATION

By _____
MATTHEW E. MURRAY

_____
JOHN D. O'BRIEN

_____
DOUGLAS K. MAGARY
Attorneys for Respondent

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
1819 H Street, N.W.
Suite 750
Washington, D.C. 20006

DATED: April 21, 1975